FILED BY CLERK
MAY 25 2010
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

JOSEPH BLAIR,

Petitioner/Appellant,

v.

ANA MARIA BLAIR,

Respondent/Appellee.

2 CA-CV 2008-0182
2 CA-CV 2009-0137
(Consolidated)
DEPARTMENT A

MEMORANDUM DECISION
Not for Publication
Rule 28, Rules of Civil
Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. D-20063485

Honorable Kenneth Lee, Judge

AFFIRMED IN PART; REVERSED IN PART AND REMANDED

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E S P I N O S A, Presiding Judge.

¶1 In these consolidated appeals, Joseph Blair challenges the trial court's apportionment of community property between himself and his former wife, Ana Maria Blair, who separately appeals from the court's denial of her motion for relief from judgment. We affirm in part, reverse in part, and remand.

Factual and Procedural History

¶2 We view the facts in the light most favorable to upholding the trial court's division of community property. *See In re Marriage of Berger*, 140 Ariz. 156, 168, 680 P.2d 1217, 1229 (App. 1983). Joseph and Ana Maria were married on July 6, 2005; Joseph served Ana Maria with a petition for dissolution of their marriage on September 20, 2006. For the duration of the marriage, Joseph worked in Europe as a professional basketball player, and Ana Maria did not work. While Joseph was abroad, Ana Maria primarily resided in a Tucson home that Joseph had purchased previously. During their brief marriage, the couple's community earnings were $388,369.16. Of that amount, they expended $40,000 to reduce the principal on the home's mortgage and spent another $28,469.70 on home improvements.

¶3 After being served with the petition for dissolution, Ana Maria remained in the Tucson home and continued to draw money from a joint bank account funded with Joseph's earnings. In early 2007, the parties reached an agreement that, in addition to paying the mortgage payment and all utilities on the home, Joseph would pay Ana Maria temporary spousal maintenance of $3,500 per month beginning in February 2007 until final disposition. In doing so, they agreed the trial court could later classify these amounts either as spousal maintenance or as a partial property distribution. Ana Maria

stayed in the home until June 2007, when Joseph returned from Europe. After he paid her an additional $20,000, she vacated the property.

¶4 Upon dissolution, the court determined Ana Maria's share of the community assets was $95,392. Of this amount, $38,514 represented Ana Maria's share of the appreciated value of the house, which the court found was Joseph's sole and separate property. The court determined Joseph was entitled to an offset for expenditures he had made after February 2007, including allowing Ana Maria to remain in the home rent-free and some of his payments to her while the dissolution proceedings were pending. Accordingly, it reduced her total award to $47,892.

¶5 Joseph filed an unsuccessful motion for reconsideration, raising all of the issues he now raises on appeal. Ana Maria filed neither a motion for reconsideration nor a notice of appeal. But six months after the trial court entered the decree of dissolution, she filed a motion pursuant to Rule 85(C)(1)(f), Ariz. R. Fam. Law P., seeking relief from the trial court's orders.[1] The court denied her motion, and she appealed. We have consolidated the appeals and have jurisdiction pursuant to A.R.S. §§ 12-2101(B) and 12-120.21(A)(1).

[1]We revested jurisdiction in the trial court to allow Ana Maria to file, and the court to consider, that motion.

Discussion

Joseph's Appeal

Offset for Amounts Paid

¶6 Joseph first contends that, in computing the amount by which Ana Maria's property award should be offset to account for the money and free rent she had received, the trial court should have started its calculation from September 2006, following service of the petition for dissolution, rather than from February 2007. We review the trial court's equitable distribution of community property for an abuse of discretion. *Boncoskey v. Boncoskey*, 216 Ariz. 448, ¶ 13, 167 P.3d 705, 708 (App. 2007). An abuse of discretion occurs when there is no evidence to support the family court's decision, *Little v. Little*, 193 Ariz. 518, ¶ 5, 975 P.2d 108, 110 (1999), or if the court has made an error of law, *Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 23, 97 P.3d 876, 881 (App. 2004).

¶7 Joseph has not established that the trial court abused its discretion. Other than a standard of review and a citation to A.R.S. § 25-318, which provides guidelines for the equitable division of property, he has cited no authority in support of his argument. His entire abuse-of-discretion argument is predicated on his contention that the trial court overlooked this argument below and his assertion that he had no donative intent. Although the court did not specifically rule on this issue, Joseph raised it twice, and the court twice declined to grant any additional offset. *See Mathews ex rel. Mathews v. Life Care Ctrs. of Am.*, 217 Ariz. 606, ¶ 21, 177 P.3d 867, 872 (App. 2008) (we assume trial court made all findings necessary to support its decision). Moreover, a party's donative intent is a question of fact for the trial court, *see Hrudka v. Hrudka*, 186 Ariz. 84, 92, 919

P.2d 179, 187 (App. 1995), as are related issues involving credibility, *see Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13, 972 P.2d 676, 680 (App. 1998). Finally, Joseph has not provided this court a transcript from which we could determine whether such a finding was contrary to the evidence.[2] Accordingly, we cannot say the court abused its discretion. *See Kohler v. Kohler*, 211 Ariz. 106, n.1, 118 P.3d 621, 623 n.1 (App. 2005) (when party does not provide trial transcript, we presume evidence supported ruling).

Equity Interest in Home

¶8 Joseph next asserts the trial court erred in calculating Ana Maria's interest in his home, which the court determined to be his separate property. He contends her award either should be reduced by approximately $16,000 or eliminated altogether.[3] We review the trial court's allocation of equity interests in separately owned real property for an abuse of discretion. *See Barnett v. Jedynak*, 219 Ariz. 550, ¶ 10, 200 P.3d 1047, 1050 (App. 2009). Although a home acquired by one party before marriage is that spouse's separate property, the community is entitled to compensation for community funds expended to make mortgage payments on the property. *Id*. ¶ 14. A marital community is

[2]Ana Maria claims evidence presented to the trial court did support an implicit finding of donative intent, but she cites portions of a transcript that has not been included in the record on appeal.

[3]Joseph's claim that Ana Maria's lien on the home should be eliminated entirely is predicated on his argument that the trial court should also have credited him for supporting Ana Maria from the time the petition for dissolution was filed in September 2006 through February 2007. Having already rejected this argument, we do not consider it further. Additionally, although a trial court has discretion to make such equitable offsets, *see In re Marriage of Pownall*, 197 Ariz. 577, ¶¶ 23-24, 5 P.3d 911, 916-17 (App. 2000), Joseph has cited no authority requiring it to do so.

entitled both to reimbursement for money applied to principal and "also to a percentage share of any increase in the value of the property due to 'the general trend of rising real estate values.'" *Id.* ¶ 15, *quoting Drahos v. Rens*, 149 Ariz. 248, 250, 717 P.2d 927, 929 (App. 1985).

¶9 In *Barnett*, we set forth a specific formula for calculating a community's interest in separate property that had appreciated in value both before and during the marriage. A community's interest in the appreciated value of a home is to be determined as follows: first, the amount the community contributed to reduce the principal of the mortgage loan is divided by the property's value at the date of marriage; the resulting quotient is then multiplied by the amount of the property's increase in value during the marriage; then the product of that multiplication is added to the amount of the community's contribution. *Id.* ¶ 21. In this case, the record reflects the community contributed $40,000 to reduce the principal of the mortgage loan. The house was valued at $1,150,000 at the time of marriage and $1,250,000 at the time of dissolution. Accordingly, the community's lien on the appreciated value of the home would equal $40,000 + [($40,000/$1,150,000) x $100,000], or $43,478.26. Ana Maria's share in the appreciated value of the home would therefore be half of that amount, or $21,739.13.[4]

¶10 The trial court, relying on *Drahos*, calculated Ana Maria's interest in the home by "adding the principal payments ($40,000.00) and the cost of [home] improvements made with community funds ($28,469.70) to the . . . principal payments

[4]The trial court was unable to apply the formula set out in *Barnett* because that case had not yet been decided when the court entered its order.

($40,000.00) plus the improvements paid by the community ($28,469.70) divided by the purchase price ($800,000.00) and multiplied by the appreciation in value that occurred during the marriage ($100,000.00)." Accordingly, it determined the community had a lien on the property in the amount of $77,028.41, of which Ana Maria's half was $38,514.20. In *Drahos*, however, the court determined the community's interest in the appreciation of a home based solely on mortgage payments the community had made. 149 Ariz. at 250, 717 P.2d at 929. Accordingly, accounting for expenditures other than mortgage principal payments is not mandated by *Drahos*, which calls into question the trial court's inclusion of the $28,469 the Blairs spent on improvements.

¶11 In denying Joseph's motion for reconsideration based on his contention the community should not be compensated under *Drahos* for the $28,469 in improvements, the trial court cited *Honnas v. Honnas*, 133 Ariz. 39, 648 P.2d 1045 (1982), for the proposition that, "where community funds [are] expended on the separate property of one of the spouses, the community [is] entitled to a portion of the appreciation of the property." But *Honnas* predated *Drahos* and reflected our supreme court's recognition that a marital community is entitled to compensation for its contributions to the appreciation in value of separate property. *See Honnas*, 133 Ariz. at 40-41, 648 P.2d at 1046-47. The formula articulated in *Drahos* and adjusted in *Barnett* attempts to do just that.

¶12 By including in the *Drahos*/*Barnett* calculation the amount expended on home improvements here, the trial court increased the community's share in the appreciation by over $30,000. Although the court was clearly acting within its discretion

when it chose to compensate the community for funds expended on separate property, we agree with Joseph that it was erroneous to include expenditures other than principal payments in the *Drahos*/*Barnett* calculation absent evidence they had contributed to the property's appreciation in value. *See Fuentes*, 209 Ariz. 51, ¶ 23, 97 P.3d at 881 (error of law constitutes abuse of discretion); *Tester v. Tester*, 123 Ariz. 41, 44, 597 P.2d 194, 197 (App. 1979) (community not entitled to appreciation when no evidence shows its expenditure contributed to increased value).

¶13 Additionally, these particular expenditures were for employing an interior designer and installing a closet-organization system. Although fact-finding is the province of the trial court, it appears neither of these expenditures is necessarily the type of capital improvement that would so clearly add to the value of the property that no further evidence of their contribution to its appreciation would be required. *Cf. Honnas*, 133 Ariz. at 40, 648 P.2d at 1046 (community entitled to share of appreciation due to construction of additional rooms). We are unaware of any authority permitting a trial court to adjust the *Drahos*/*Barnett* appreciation formula, much less to do so by treating expenditures for decorating or other common home improvements as capital improvements increasing the value of real property. *See In re Marriage of Marsden*, 181 Cal. Rptr. 910, 915-16 (Cal. Ct. App. 1982) (formula for calculating community's interest in appreciation intended to compensate community for increased equity in home). Accordingly, we find the trial court abused its discretion in calculating the amount of the community's interest in the separately owned house.

¶14 On remand, the trial court must recalculate the amount of the community's lien. Although it may give the community credit for the money spent on home improvements during the marriage, it should not consider those expenditures as coequal to the $40,000 contributed to reduce the principal amount of the mortgage. Accordingly, the court must apply *Barnett* to determine the community's interest in the appreciated value of the home and may, in its discretion, use any equitable means in calculating Ana Maria's portion of the community funds expended on these home improvements.

Income Tax Refund

¶15 Joseph next contends the trial court incorrectly allocated proceeds of the couple's 2005 income tax refund. He maintains that, because the parties married in July 2005, the community was entitled only to the portion of the tax refund that corresponded to money earned after their marriage. Specifically, Joseph argues that, because they were married for only half of 2005, the community was entitled to only half of the corresponding tax refund: $10,594.08, rather than $21,188.16.

¶16 As previously noted, the trial court has broad discretion in apportioning community and separate assets. *See Boncoskey*, 216 Ariz. 448, ¶ 13, 167 P.3d at 708. And a party claiming separate property has the burden of proving such property is, in fact, separate and not community. *See Cockrill v. Cockrill*, 124 Ariz. 50, 52, 601 P.2d 1334, 1336 (1979). Although the trial court did not expressly rule on this issue, there is evidence in the record that would support a finding that the income tax refund on Joseph's 2005 premarital earnings had been transmuted to community funds, thus supporting the court's overall property distribution. *See Kohler*, 211 Ariz. 106, n.1, 118

P.3d at 623 n.1. In 2005, the Blairs elected to file a joint tax return as a married couple and their 2005 tax refund was deposited into a joint bank account. Given these actions, the trial court could reasonably conclude Joseph had intended to convert any separate property funds included in the refund to a community asset.

Ana Maria's Answering Brief and Appeal

Home as Community Property

¶17 In her answering brief, Ana Maria contends the trial court erred in finding the marital home is Joseph's separate property. We do not address this argument, however, because "the appellee may raise a cross-issue in the answering brief only if the issue does not result in an enlargement of appellee's rights or a lessening of appellant's rights on appeal." *Engel v. Landman*, 221 Ariz. 504, ¶ 17, 212 P.3d 842, 848 (App. 2009); *see also* Ariz. R. Civ. App. P. 13(b)(3) (appellate court may not order judgment modified to appellant's detriment or appellee's benefit unless appellee filed cross-appeal seeking such relief).

Motion for Relief from Judgment

¶18 In her separate appeal, Ana Maria challenges the trial court's refusal to grant her motion for relief from judgment under Rule 85(C)(1)(f).[5] A motion pursuant to this rule is analogous to a motion for a new trial under Rule 60(c), Ariz. R. Civ. P., *see*

[5]Rule 85(C) allows a trial court to grant relief on a number of grounds. In her brief, Ana Maria cites Rule 85(C)(1)(a) and (b), which pertain to mistake, inadvertence, surprise, or excusable neglect as well as newly discovered evidence. Apparently conceding these reasons do not apply, however, she focuses her argument on her entitlement to relief pursuant to Rule 85(C)(1)(f), which allows a trial court to grant relief for "any other reason."

Cohen v. Frey, 215 Ariz. 62, n.1, 157 P.3d 482, 484 n.1 (App. 2007), which we review for an abuse of discretion, *see Maher v. Urman*, 211 Ariz. 543, ¶ 21, 124 P.3d 770, 777 (App. 2005). A court abuses its discretion if no evidence supports its decision or the reasons given for its actions are "'clearly untenable, legally incorrect, or amount to a denial of justice.'" *Charles I. Friedman, P.C. v. Microsoft Corp.*, 213 Ariz. 344, ¶ 17, 141 P.3d 824, 830 (App. 2006), *quoting State v. Chapple*, 135 Ariz. 281, 297 n.18, 660 P.2d 1208, 1224 n.18 (1983).

¶19 In her motion, Ana Maria sought compensation for community funds Joseph had expended to increase his net worth by "at least $200,000 during the[ir] marriage when he commingled community funds and purchased investments for himself." The trial court denied the motion, noting that her circumstance is not "the type or kind of extraordinary circumstance of hardship or injustice" the rule envisions because the errors she claimed "could easily have been addressed in a Motion for New Trial or a[] direct [a]ppeal," neither of which she filed. Moreover, the court added that, even had it addressed her arguments on the merits, they would fail because the court would have to ignore the facts and instead assume "all the community earnings were invested and commingled with [Joseph]'s separate property investments and all expenditures made during the marriage were from his separate assets."

¶20 On appeal, Ana Maria does not attempt to address the trial court's ruling, but instead reurges the same arguments she made in support of her Rule 85 motion. She does not address the court's finding that she could have timely made this argument below but failed to do so. She similarly does not acknowledge that her motion, which was

based entirely on a new interpretation of the same evidence available at trial, was not supported by the facts of the case. In short, because her Rule 85 motion amounted to nothing more than a request for the court to reinterpret the evidence and make new findings of fact, we cannot say the court abused its discretion in declining to do so.

Disposition

¶21 The trial court's rulings are affirmed with the exception of its award for the $28,469.70 in home improvements. The case is remanded to the trial court to recalculate the community's interest in the appreciation of the house in a manner consistent with this decision.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge